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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

United States of America,

v.

07 Cr. 814 (JFK)

Rodolphe Nogbou,

Defendant.

**DEFENSE COUNSEL'S SENTENCING MEMORANDUM IN THE MATTER OF**  
**UNITED STATES v. RODOLPHE NOGBOU**

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## **PRELIMINARY STATEMENT**

Linklaters LLP, attorneys for Rodolphe Nogbou, respectfully submits this Sentencing Memorandum (the “Memorandum”) to assist the Court in determining his sentence.<sup>1</sup> Mr. Nogbou respectfully requests that this Court impose a sentence of time-served for his violation of 18 U.S.C. § 111(a). Mr. Nogbou has been incarcerated since his arrest on August 22, 2007 and has served almost 12 months in jail.

This memorandum sets forth three different methods by which the Court may fashion a sentence of time-served for Mr. Nogbou. This Court may: (1) impose a 0-6 month sentence pursuant to United States Sentencing Guidelines (“U.S.S.G” or “Guidelines”) Section 2A3.3 because Mr. Nogbou’s conduct is most readily classified as a minor assault;<sup>2</sup> (2) apply U.S.S.G. § 2A2.4 as proposed by the United States District Court for the Southern District of New York Probation Office (the “Probation Office”) without the application of the two level upward adjustment; or (3) simply impose a non-Guidelines sentence pursuant to Title 18 U.S.C. § 3553(a).

### **A. OFFENSE BACKGROUND**

Mr. Nogbou was charged in an indictment with “[a]ssaulting, resisting, or impeding certain officers or employees,” specifically Court Security Officer Vincent Esposito (“CSO Esposito”), in violation of 18 U.S.C. § 111(a) and (b). On August 22, 2007, Mr. Nogbou, a pro se litigant in an unrelated civil matter, entered the United States Courthouse at 500 Pearl Street and attempted to pass through security at the Worth Street entrance of the Courthouse.

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<sup>1</sup> At the request of Mr. Nogbou and to insure that he is fully satisfied that all of his arguments and statements are included in the record, a letter from Mr. Nogbou detailing additional points he wishes to make in his own words to the Court is hereto attached as Exhibit A.

<sup>2</sup> The Court may reach a sentence of time served with or without the two level upward adjustment recommended by the Probation Office, which is discussed infra.

Mr. Nogbou is a regular visitor to the Courthouse and was entering to file an Amended Complaint in his civil action, Nogbou v. Lore, et al., 07 Civ. 8515 (RWS). While going through the security line, an incident occurred that led to the indictment against him.<sup>3</sup> At his trial in January 2008, the jury found Mr. Nogbou guilty of violating Section 111(a), but did not find Mr. Nogbou guilty of violating Section 111(b).<sup>4</sup> This fact is pertinent because Section 111(b) permits the Court to impose an enhanced penalty if the assault caused bodily injury. Notably, the jury found that bodily injury was not sustained in this case.

## **B. THE PSR AND GUIDELINES ANALYSES**

As set forth in the Presentence Investigation Report (the “PSR”) prepared by the Probation Office, Mr. Nogbou has zero criminal history points and is in a Criminal History Category of I. PSR, at p. 7. The PSR sets out a Guidelines range of 18-24 months of incarceration with no possibility of probation pursuant to U.S.S.G. § 2A2.4.<sup>5</sup> PSR, at p. 6.

The defense respectfully submits that the Probation Office’s calculation of Mr. Nogbou’s sentence is incorrect. The appropriate Guidelines calculation is 0-6 months of incarceration pursuant to U.S.S.G. § 2A2.3. Applying U.S.S.G. § 2A2.3 assigns Mr. Nogbou a

<sup>3</sup> The full text of the indictment follows:

“On or about August 22, 2007, in the Southern District of New York, Rodolphe Nogbou, the defendant, unlawfully, willfully, and knowingly did forcibly assault, resist, oppose, impede, intimidate, and interfere with a person designated in Title 18, United States Code, Section 1114, while such person was engaged in and on account of the performance of official duties, and, in the commission of said acts, did inflict bodily injury, to wit, Nogbou intentionally struck Court Security Officer Vincent Esposito (“CSO Esposito”) in the face...causing CSO Esposito to suffer cuts and abrasions resulting in the need for CSO Esposito to suffer cuts and abrasions and resulting in the need for CSO Esposito to receive medical attention, including stitches. (Title 18, United States Code, Section 111(a), (b).)”

The complaint states, “Nogbou punched the court security officer in the face while the Court Security Officer was using a wand to perform a Security Check.”

<sup>4</sup> Mr. Nogbou would like to note his continuing objection to the verdict form used during his trial and that the jury had specific questions about the form which were left unanswered. There are a number of issues that Mr. Nogbou plans to appeal after he is sentenced, including the language used in the verdict form. However, for purposes of sentencing only, he would like to be sentenced under 18 U.S.C. § 111(a).

<sup>5</sup> A copy of defense’s letter to the Probation Office objecting to the PSR is hereto attached as Exhibit B.

Base Offense Level of 7, as the offense did involve physical contact. See U.S.S.G. § 2A2.3(1). As discussed more fully infra, the Court should apply U.S.S.G. § 2A2.3 (“Minor Assault”) rather than U.S.S.G. § 2A2.4 (“Obstructing or Impeding Officers”) because: (1) Section 2A2.2 is an alternative starting point from Section 2A2.4 for calculating a sentence when 18 U.S.C. § 111 has been violated;<sup>6</sup> and (2) Application Note 1 of U.S.S.G. § 2A2.3 defines “Minor Assault” as a misdemeanor assault, or a felonious assault not covered by Section 2A2.2 (“Aggravated Assault”). As a result, Section 2A2.3 is the appropriate Guideline to govern Mr. Nogbou’s sentence.

Mr. Nogbou contends that the two level upward adjustment for bodily injury is inapplicable because any contact that took place was minor and the jury determined that physical injury was not proven. Accordingly, we respectfully submit that Mr. Nogbou’s proper Advisory Guidelines Level is 7. With a Criminal History of I, the appropriate Guidelines Range is 0-6 months.<sup>7</sup> It is important to note that Mr. Nogbou has already served twice the sentence at the high end of this range.<sup>8</sup>

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<sup>6</sup> See U.S.S.G. Appendix A at 1881.

<sup>7</sup> Were the Court to determine that the upward adjustment is applicable, Mr. Nogbou’s Guideline Range at Level 9 would be 4-10 months.

<sup>8</sup> In the alternative, the defense submits that: (i) Section 2A2.4 with no upward adjustment for bodily injury may also be applicable, which results in a sentence of 12-18 months; and (ii) if this Guidelines analysis is adopted by the Court, Mr. Nogbou should be sentenced at the low end of that Guidelines range.

Finally, the defense respectfully submits that a non-Guidelines sentence is warranted in this case because the circumstances surrounding the incident at the Courthouse were not contemplated by the U.S.S.G.

As discussed more fully infra, Mr. Nogbou has spent almost a year in jail and a sentence of time-served is sufficient to achieve the goals of sentencing – retribution, deterrence, incapacitation, and rehabilitation.

## **ARGUMENT**

### **I. THE PROPER GUIDELINES SECTION APPLICABLE TO THIS OFFENSE IS SECTION 2A2.3.**

The jury acquitted Mr. Nogbou of the enhanced penalties of 18 U.S.C. § 111(b) by finding that no one suffered a bodily injury. Due to the jury's finding and the atypical nature of this case, the Court should apply U.S.S.G. § 2A2.3 ("Minor Assault") rather than U.S.S.G. § 2A2.4 ("Obstructing or Impeding Officers") as recommended in the PSR. PSR, at p. 6. The Statutory Index to the Guidelines state that either Sections 2A2.2 or 2A2.4 are applicable to sentences imposed after a conviction of 18 U.S.C. § 111. See U.S.S.G. Appendix A.

Section 2A2.4 governs sentences where a federal officer is obstructed or impeded in the performance of his/her duties. Mr. Nogbou never intended to, nor did, obstruct or impede the officers in the performance of their duties. As such, we respectfully submit that Section 2A2.2 is an alternative and proper starting point for sentencing Mr. Nogbou's violation of 18 U.S.C. § 111.

Next, because Application Note 1 of U.S.S.G. § 2A2.3 defines "Minor Assault" as a misdemeanor assault, or a felonious assault not covered by Section 2A2.2 ("Aggravated Assault"), Section 2A2.3 may be applied when determining sentences initially evaluated under Section 2A2.2. Mr. Nogbou's conduct was not an aggravated assault because it did not involve a dangerous weapon, serious bodily injury, or intent to commit another felony. See U.S.S.G. § 2A2.2 Application Note 1. The defense respectfully submits that Section 2A2.3 is the most appropriate section to use in calculating Mr. Nogbou's sentence because the conduct at issue is most appropriately termed a minor assault.<sup>9</sup>

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<sup>9</sup> U.S.S.G. § 3A1.2 is also inapplicable because Mr. Nogbou's conduct was not motivated by CSO Esposito's status as a government officer. See U.S.S.G. § 3A1.2(a).

Applying U.S.S.G. § 2A2.3, and the jury's verdict that the offense involved physical contact; Mr. Nogbou's Base Offense Level is 7. See U.S.S.G. § 2A2.3(1). As discussed infra, the two-level upward adjustment provided for in Section 2A2.3(b)(1) should not be applied because the jury determined there was no bodily injury. Accordingly, we respectfully submit that Mr. Nogbou's proper Advisory Guidelines Level is 7. With a Criminal History Category of I, his Guidelines Range is 0-6 months. Were the Court to determine that the upward adjustment is applicable, Mr. Nogbou's Guidelines Range at Level 9 would be 4-10 months. Notably, the high end of the enhanced Guidelines Range is still less time than Mr. Nogbou has already served; further demonstrating that a sentence of time-served adequately serves the goals of sentencing in this atypical case.

The facts and circumstances set forth infra establish that the events of August 22, 2007 were not contemplated by the Sentencing Commission when promulgating U.S.S.G. § 2A2.4 for offenses committed in violation of 18 U.S.C. § 111. The events of August 22, 2007 were the result of a miscommunication that unfortunately resulted in Mr. Nogbou having a minor incident with Court Security Officers while attempting to enter the United States Courthouse for a lawful purpose. We respectfully request that this Court apply U.S.S.G. § 2A2.3 and that the appropriate recommended sentence for Mr. Nogbou's conviction is 0-6 months.

## **II. THE COURT SHOULD NOT APPLY THE TWO-LEVEL UPWARD ADJUSTMENT FOR BODILY INJURY.**

The Probation Office calculates a Total Offense Level of 15 in the PSR. PSR, at p. 6. The Probation Office begins its Guideline calculation by applying U.S.S.G. § 2A2.4 ("Obstructing or Impeding Officers") and determines that Mr. Nogbou's Base Offense Level is 10. Pursuant to U.S.S.G. § 2A2.4 a three-level upward adjustment is warranted because the offense involved physical contact. The Probation Office goes one step too far, however, and

recommends this Court impose an additional two-level upward adjustment on the basis that CSO Esposito sustained a bodily injury. PSR, at p. 5-6. As such, the PSR recommends a sentence of 18-24 months. PSR, at p. 15. The jury, however, found that no bodily injury occurred.

Although the Court has the discretion to consider acquitted conduct at sentencing as the PSR states,<sup>10</sup> a review of the facts supports the jury's finding that there was no bodily injury in this case. The two-level upward adjustment for bodily injury should not be added regardless of which section of the Guidelines the Court deems appropriate. Therefore, Mr. Nogbou would face a maximum Offense Level of 13 and a recommended sentence of 12-18 months if Section 2A2.4 is applied,<sup>11</sup> and a maximum Offense Level of 7 and a recommended sentence of 0-6 months if Section 2A2.3 is applied.<sup>12</sup>

While it is undisputed that CSO Esposito was treated at the scene and later taken to the emergency room, the severity of his injury is in dispute. Trial testimony demonstrates that immediately after the incident it was unclear whether CSO Esposito was bleeding.

"Q: Did you see Officer Esposito bleeding at that time?

MR. NOGBOU: No.

THE COURT: Did you hear anybody mention the fact that he was bleeding?

A: No."

Tr. at 339:2-6.

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<sup>10</sup> See United States v. Vaughn, 430 F.3d 518 (2d Cir. 2005) (considering a jury's acquittal "when assessing the weight and quality of the evidence presented by the prosecution and determining a reasonable sentence.").

<sup>11</sup> Mr. Nogbou's sentencing hearing is on August 14, 2008, just shy one week from a full year of incarceration. Coincidentally, twelve months is the low end of the Guidelines range using Section 2A2.4 without the upward adjustment for bodily injury.

<sup>12</sup> If the upward adjustment for bodily injury is applied under Section 2A2.3, the maximum Offense Level is 9 and the recommended sentence is 4-10 months.

At the time of the alleged incident commotion did not ensue. Mr. Nogbou was allowed to, and indeed was, preparing to leave the Courthouse. The video shows Mr. Nogbou returning to the beginning of the conveyor belt on the X-ray machine to retrieve his belongings in preparation to leave. It is a fair assumption that any injury endured by CSO Esposito was minor because the injury was not obvious to the people around him, it is unclear if he was even bleeding and most importantly—Mr. Nogbou was initially permitted to leave the Courthouse.<sup>13</sup> In fact, Mr. Nogbou was arrested only after he attempted to record the names of the CSOs involved in the incident and not as a direct reaction to CSO Esposito's injury.

In short, the physical contact between Mr. Nogbou and CSO Esposito should not be considered "bodily injury" under the definition given in the Guidelines because any injury was slight. The lack of bodily injury (which is supported by the jury's verdict that no bodily injury occurred) makes the two-level upward adjustment under U.S.S.G. § 2A2.4 excessive.

In essence, Mr. Nogbou has already served the low end of the Guidelines range under Section 2A2.4 without the upward adjustment for bodily injury as he will be incarcerated for all but a week of the full sentence. A sentence of time-served is warranted.

### **III. THE COURT HAS DISCRETION TO IMPOSE A NON-GUIDELINES SENTENCE.**

Even if the Court adopts the Guidelines calculation in the PSR, the Court has the discretion to impose a non-Guidelines sentence in this case. The Supreme Court recently reiterated the advisory nature of the U.S. Sentencing Guidelines in Gall v. United States, 128 S. Ct. 586 (2007) and Kimbrough v. United States, 128 S. Ct. 558 (2007). These two cases extended the line of cases that return sentencing discretion to the trial courts. See United States v. Booker, 543 U.S. 220 (2005); United States v. Crosby, 397 F.3d 103 (2d Cir. 2005). A

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<sup>13</sup> The facts surrounding the incident are detailed in Section III(A).

sentencing court is no longer bound by the sentence calculated in accordance with the Guidelines and may impose a sentence less than that recommended by the Guidelines if it is sufficient to carry out the law.

In Gall, the Supreme Court stated that the Guidelines should be the starting point for the district court to calculate a sentence and not the only consideration. Gall, 128 S. Ct. at 596. The Court went on to state, “the district judge . . . may not presume that the Guidelines range is reasonable. He must make an individualized assessment based on the facts presented.” Gall, 128 S. Ct. at 596-97. Courts must continue to consider all of the factors listed in 18 U.S.C. § 3553(a) when deciding a defendant’s sentence rather than solely looking at the sentencing range pursuant to the Guidelines.<sup>14</sup> In Kimbrough the Court calls Section 3553(a) an “overarching provision,” and emphasizes that it “permits the court to tailor the sentence in light of other statutory concerns as well.” Kimbrough, 128 S. Ct. at 570 (quoting Booker, 543 U.S. at 245-46).

Under Section 3553(a), courts should consider a variety of factors, including the nature and circumstances of the offense and the history and characteristics of the defendant,

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<sup>14</sup> Section 3553(a) provides that the court, in determining the particular sentence to be imposed, shall consider--

- (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
- (2) the need for the sentence imposed--
- (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
- (B) to afford adequate deterrence to criminal conduct;
- (C) to protect the public from further crimes of the defendant; and
- (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
- (3) the kinds of sentences available;
- (4) the kinds of sentence and the sentencing range established for--
- (A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines...
- (5) any pertinent policy statement...
- (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
- (7) the need to provide restitution to any victims of the offense.

whether the sentence will afford adequate deterrence to criminal conduct, and whether the sentence will protect the public from further crimes of the defendant.

This two-step sentencing process – considering the Guidelines and then independently looking at the 3553(a) factors – gives courts greater discretion when determining the appropriate sentence in a case. Gall, 128 S. Ct. at 594; Kimbrough, 128 S. Ct. at 574; Booker, 543 U.S. at 256; Crosby, 397 F.3d at 110-13; see also United States v. Martinez, 413 F.3d 239, 243 (2d Cir. 2005) (“[J]udges imposing sentence in accordance with Booker may exercise greater discretion than they could have exercised under the pre-Booker regime.”). To assist it in making this determination, a court is entitled to find “all the facts appropriate for determining either a Guidelines sentence or a non-Guidelines sentence.” Crosby, 397 F.3d at 113.

For the reasons set forth more fully below, and in light of the fact that this Court may impose a materially different sentence than a Guidelines sentence, the defense respectfully requests that this Court impose a non-Guidelines sentence of time-served, in the event the Guidelines analysis the Court adopts precludes imposition of a sentence of time-served. Mr. Nogbou has already spent almost twelve months in jail. This time is sufficient to meet the goals of 18 U.S.C. § 3553(a).

**A. THE NATURE AND CIRCUMSTANCES OF THE OFFENSE SUPPORT A NON-GUIDELINES SENTENCE OF TIME-SERVED**

The first factor of 18 U.S.C. § 3553(a) instructs the Court to consider the nature and circumstances of the offense and the history and characteristics of the defendant.

Due to circumstances beyond his control, Mr. Nogbou is unable to supply any letters supporting this Memorandum. Mr. Nogbou does not have any family to speak of and had no way to contact his friends. Mr. Nogbou has experienced life as a homeless person and since

arriving in the United States, he has focused on bettering himself through education at various colleges and universities. PSR, at p. 9. Mr. Nogbou has struggled to find consistent employment, but not for lack of trying. Further, Mr. Nogbou has no previous history of violence and poses no threat to society.

The Indictment alleges that on August 22, 2007, as Mr. Nogbou was attempting to enter the Worth Street entrance to the United States District Courthouse located at 500 Pearl Street, he “intentionally struck Court Security Officer Vincent Esposito (“CSO Esposito”) in the face . . . causing CSO Esposito to suffer cuts and abrasions and resulting in the need for the CSO to receive medical attention.” Paragraph 2(b) of the Criminal Complaint alleges that Mr. Nogbou “punched” the CSO in the face. However, reviewing the security video of the incident reveals a lack of any observable “punch” to CSO Esposito’s face and tends to contradict the initial basis for Mr. Nogbou’s arrest. Mr. Nogbou was not arrested until after he stated he was going to file a complaint against the CSOs at the security checkpoint.

It is important to note that Mr. Nogbou was entering the Courthouse for a lawful purpose. He is a pro se litigant in a pending civil matter, Nogbou v. Lore, et al., 07 Civ. 8515 (RWS).<sup>15</sup> On August 22, 2007, Mr. Nogbou was attempting to enter the Courthouse in order to file an Amended Complaint, which was among the items recovered following his arrest.

A review of the video results in the following timeline. At 12:13:00, Mr. Nogbou can be seen entering the revolving door of the Worth Street entrance of the Courthouse. At 12:13:07, Mr. Nogbou can be seen patiently standing at the entrance of the security checkpoint area of the lobby, waiting for his turn to go through the security check. As the security area

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<sup>15</sup> Mr. Nogbou would like to note that his present incarceration has presented numerous obstacles for him to overcome in order to properly assert his claims in that action.

ahead of him clears, he walks straight to the security table and begins emptying his pockets and jacket into the security bin at 12:13:51.

At 12:14:32, Mr. Nogbou was still outside the metal detector (at the security area's entrance) when CSO Esposito motioned him to come through the metal detector. At 12:14:36, while Mr. Nogbou is walking through the metal detector, CSO Esposito walks up and meets Mr. Nogbou halfway. CSO Esposito's arms are crossed behind his back as he approaches Mr. Nogbou, whose arms are in the air. At 12:14:55, Mr. Nogbou can be seen taking the straps off of his coverall. CSO Esposito cannot be seen fully in the video, while Mr. Nogbou has one of his arms in the air and the other is holding up one side of his pants. At 12:15:22, Mr. Nogbou can be seen turning away from CSO Esposito and engaged in conversations with the other CSOs.

At 12:15:34, Mr. Nogbou can be seen returning to CSO Esposito. Mr. Nogbou again holds one arm in the air while his opposite hand holds up one side of his pants. However, CSO Esposito cannot fully be seen because he is scanning Mr. Nogbou's feet at this point.<sup>16</sup> At 12:15:54, CSO Esposito pushes Mr. Nogbou into the corner of the security table. Mr. Nogbou can be seen in a verbal exchange with the other CSOs. Mr. Nogbou is released at 12:16:09 and the CSOs motion for him to leave at 12:16:15.

At 12:16:24, a CSO returns Mr. Nogbou's property to him, which Mr. Nogbou picks up from the security bin. At 12:17:00, Mr. Nogbou can be seen working something in his hand. Mr. Nogbou is then placed under arrest at 12:17:21. At 12:18:51, Mr. Nogbou is taken in his underwear into the lobby towards the elevators.

At 12:16:07, the video clearly depicts Mr. Nogbou being allowed to walk back through the metal detector, and he began to pick up his personal belongings on the table for the

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<sup>16</sup> Mr. Nogbou provided the description of CSO Esposito's actions when he is off-camera.

purpose of leaving the building. Mr. Nogbou contends that after he swept the wand out of his pants he was requested to leave the building by the CSOs. Mr. Nogbou voiced his concern that he was being denied access to the building for a proper purpose, but then complied with the CSOs' request and attempted to leave the building.

As he gathered his personal effects from the security tray, Mr. Nogbou engaged the CSOs in a discussion in which he suggested he would bring a civil action against them for denying his access to the Court. He relates that as he was participating in this discussion, he attempted to activate his cell phone, informing the CSOs that he intended to take their photographs to assist his complaint. It is at that time Mr. Nogbou was placed in custody. A cellular telephone was amongst Mr. Nogbou's personal effects.

Given these circumstances and the nature of the events, a sentence of time-served is sufficient punishment for Mr. Nogbou. See United States v. Collado, No. 07 Cr. 1144(HB), 2008 WL 2329275 (S.D.N.Y. June 5, 2008). If the Court adopts the recommended sentence calculation in the PSR, a non-Guidelines sentence of time-served is warranted in this case based on the nature and facts and circumstances of the offense.

### **CONCLUSION**

Time-served is an appropriate sentence for Mr. Nogbou. He wished to enter the Courthouse for a lawful purpose. Mr. Nogbou complied with the proper requests of CSO Esposito as CSO Esposito further inspected his midsection with the wand. By sweeping the wand away from his groin area, Mr. Nogbou did not intend to hurt anyone. Mr. Nogbou's conduct was occasioned by the wand's close proximity to his groin area and his discomfort with, and surprise at, this occurrence.

Based on the nature and circumstances of the events of August 22, 2007, the lack of intent to harm, and the jury's finding of no bodily injury, the defense submits that time-served

is a proper and just sentence for Mr. Nogbou. This can be achieved in three ways. First, application of Section 2A2.3, without or with the upward adjustment for bodily injury, results in a recommended sentence of 0-6 months or 4-10 months, respectively. Mr. Nogbou has served more than the high end of these sentencing ranges. Second, application of Section 2A2.4 without the two-level upward adjustment for bodily injury results in a range of 12-18 months. Mr. Nogbou has nearly served a sentence at the low end of this sentencing range. Third, if the Court adopts the Guidelines calculation in the PSR, a non-Guidelines sentence is justified based on the nature and circumstances of the offense.<sup>17</sup>

Dated: New York, New York  
August 6, 2008

Respectfully submitted,

Linklaters LLP

By:

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<sup>17</sup>

In the alternative, if the Court does not determine that a sentence of time-served is appropriate, we submit that Mr. Nogbou should be sentenced to the low end of the range suggested in the PSR and receive a sentence of 18 months imprisonment.

## **EXHIBIT A**

United States

-against-

07 CR. 814 (JFK)

Rodolphe Nogbou

**DEFENDANT'S SENTENCING MEMORANDUM**  
**ON HIS OWN BEHALF**

TO HONORABLE JOHN F. KEENAN  
UNITED STATES DISTRICT JUDGE  
UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK  
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FROM DEFENDANT  
RODOLPHE NOGBOU  
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MCC-NEW YORK  
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New York, New York  
August 04, 2008

Your Honor:

RODOOLPHE NOGOBOU, defendant in the above mentioned matter, is scheduled to be sentenced on August 14, 2008, for being found guilty of "Assault Without Bodily Injury", following a trial which ended on January 11, 2008; and upon and Indictment which charges that:

"On or about August 22, 2007, in the Southern District of New York, Rodolphe Nogbou, the defendant, unlawfully, willingly, and knowingly did forcibly assault, resist, oppose, impede, intimidate, and interfere with a person designated in Title 18, United States Code, Section 114, while such person was engaged in and on account of the performance of official duties, and in the commission of said acts, did inflict bodily injury, to wit, Nogbou intentionally struck Court Security Officer Vincent Esposito ("CSO Esposito") in the face...causing CSO Esposito to suffer cuts and abrasions resulting in the need for CSO Esposito to receive medical attention including stiches.

(Title 18, United States Code, Section 111(a), (b).)"

And the complaint states that:

"Nogbou punched the court security officer in the face, while the court security officer was using a wand to perform a security check."

The defendant is submitting this sentencing memorandum on his own behalf, because of the divergences of views between his Court appointed CJA counsel, and him (defendant), concerning the nature and circumstances of the events of August 22, 2007, and the significance of the jury's verdict and findings.

This defendant's sentencing memorandum is to give the positions of the defendant, and to reflect the verdict and findings of the jury, for sentencing purposes.

Page 2

It ought to be noted that, the defendant's counsel's sentencing memorandum is a view of the counsel of this matter at hand, 07 CR. 814(JFK); consequently, it must not be viewed as an ultimate position of the defendant.

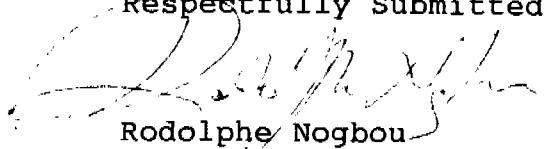
For, the defendant submits that, in reviewing the two sentencing memoranda, the Court consider the view of the defendant at points of divergences between counsel and defendant. Simply because counsel is not a witness to the events of August 22, 2007, and is not in position to modify the findings and verdict of the jury.

Also, the defendant had attached a copy of his Objections to the Presentence Report, for the purposes of sentencing.

The defendant would like to bring to the attention of the Court that the probation officer had not responded to the objections of the defendant to the Presentence Report; consequently, there is no revised version of the presentence Report.

Respectfully Submitted,

Dated: New York, New York  
August 04, 2008.

  
Rodolphe Nogbou  
# 60326-054  
Defendant  
MCC-New York  
150 Park Row  
New York, NY 10007

**DEFENDANT'S SENTENCING MEMORANDUM  
ON HIS OWN BEHALF**

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I. PRELIMINARY STATEMENT

RODOLPHE NOGBOU, defendant, respectfully submits on his own behalf, this Sentencing Memorandum to assist the Court in determining his sentence.

Nogbou respectfully requests that, the Court impose a sentence of time-served for being found guilty of "Assault Without Bodily Injury", which would fall under 18 U.S.C. §111(a), even though, the particular act of assault had never been stated.

1. Nogbou was charged in an Indictment which reads that: "On or about August 22, 2007, in the Southern District of New York, Rodolphe Nogbou, the defendant, unlawfully, willfully, and knowingly did forcibly assault, resist, oppose impede, intimidate, and interfere with a person designated in Title 18, United States Code, Section 114, while such person was engaged in and on account of the performance of official duties, and in the commission of the said acts, did inflict bodily injury to wit, Nogbou intentionally struck Court Security Officer Vincent Esposito ("CSO Esposito") in the face...causing CSO Esposito to suffer cuts and abrasions resulting in Esposito to receive medical attention, including stiches.  
(Title 18, United States Code, Section 111(a), (b)."

The complaint states that:

"Nogbou punched the court security officer in the face while the court security officer was using a wand to perform a security check."

2. The indictment resulted from an incident that took place at the security checkpoint, in the lobby of the Worth Street entrance of the United States Patrick Monihan Courthouse, when Nogbou, a Pro Se litigant (and regular visitor) was coming to serve an amended complaint.
3. Following a trial in January 2008, and by means of a special jury form (objected by defendant and questioned by the jury), defendant had been found guilty of "Assault Without Bodily Injury" (which does not specify the particular act of assault committed by the defendant, on August 22, 2008).
4. However, even though, the particular act of assault had never been stated, and for the purposes of sentencing only, the verdict of "Assault Without Bodily Injury", will be assumed to fall under 18 U.S.C. §111(a).

5. Nogbou has zero criminal history points, and is in criminal history category I. The Presentence Report ("PSR") sets out a sentencing range of 18-24 months of incarceration with no possibility of probation.
6. The defendant respectfully submits that, the calculation of Nogbou's sentence is incorrect; and the proper sentence should be 0-6 months, based on and adjusted offense level of 7, and a criminal history of category I.
7. Nogbou had been incarcerated since August 22, 2007, and as of August 14, 2008, he will have spent almost 12 months (a year) in jail. This is twice the recommended sentence at an offense level 7.

## II. GUIDELINES ANALYSIS

8. The jury had found Nogbou guilty of "Assault Without Bodily Injury" by means of a special jury form which does specify the particular act of assault committed by the defendant on August 22, 2007.
9. The matter under speculation in this instance of sentencing, is what, the special jury form meant by "Assault Without Bodily Injury"; and the jury had also questioned this special form as a result of confusion, and the defendant had objected to the use of the said special jury form.
10. Moreover, the defendant holds that, due to the fact that, no specific act of assault had been stated or declared by the special jury form, the Court may apply a sentence which reflects the lack of a specific act of assault committed by the defendant on August 22, 2007 (in the verdict of "Assault Without Bodily Injury"); otherwise, it would be charging and sentencing the defendant for assault, without showing the specific act of assault committed, for which the defendant is condemned.
11. For, the defendant submits, that the Court apply the lowest level of assault; which would naturally not fall under U.S.S.G. §2A2.4 (as stated in the PSR).
12. Accordingly, the defendant respectfully submits that his proper advisory guideline level is 7. With a criminal history category of I, his guideline range is 0-6 months.

13. Were the Court to determine that the enhancement is applicable, the defendant's guideline range at level 9, would be 4-10 months. Notably, the high end of the enhanced guideline range, which is still less time than the defendant has been incarcerated.

III. ARGUMENT

14. A. THE COURT HAS DISCRETION TO IMPOSE A FAIR SENTENCE

15. The Supreme Court recently reiterated the advisory nature of the U.S. Sentencing Commission Guidelines in Gall v. United States, 128 S.Ct. 586 (2007) and Kimbrough v. United States, 128 S.Ct. 558 (2007).

16. The two cases extended the line of cases that return sentencing discretion to the trial Courts. See United States v. Booker, 543 U.S. 220 (2005); United States v. Crosby, 397 F.3d 103 (2nd Cir. 2005).

17. A sentencing Court is no longer bound by the sentence calculated in accordance with the Guidelines, and may impose a sentence less than that recommended by the Guidline, if it is sufficient to carry out the law.

18. In Gall, the Supreme Court stated that, the Guidelines should be the starting point for the District Court to calculate a sentence and not the only consideration. Gall, 128 S.Ct. at 596. The Court went on to state, "[T]he district judge...may not presume that the Guideline range is reasonable. He must make an individualized assessment based on the facts presented."

19. Gall, 128 S.Ct. at 596-97. Courts must continue to consider all of the factors listed in section 18 U.S.C. §3553(a) when determining a defendant's sentence, rather than solely looking at the sentencing range pursuant to the Guidelines.

20. In Kimbrough, the Court calls this an "overarching provision", and emphasizes that §3553(a) "permits the court to tailor the sentence in light of other statutory concerns as well." Kimbrough, 128 S.Ct. at 570 (quoting Booker, 543 U.S. at 245-46).

21. Under section 3553(a), Courts should consider a variety of factors, including the nature and circumstances of the offense and the history and characteristics of the defendant; the need for the sentence imposed, to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; to afford adequate deterrence to criminal conduct; whether the sentence will protect the public from further crimes of the defendant; the kinds of sentence and sentencing range established for the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines; the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.
22. This two-step sentencing process (considering the guidelines and then independently looking at the 3553(a) factors) gives courts greater discretion when determining the appropriate sentence in a case.
23. Gall, 128 S.Ct. at 594; Kimbrough, 128 S.Ct. at 574; Booker, 543 U.S. at 256; Crosby, 397 F.3d at 110-13; United States v. Martinez, 413 F.3d 239, 243 (2nd Cir. 2005) ("[J]udges imposing sentence in accordance with Booker may exercise greater discretion than they could have exercised under the pre-Booker regime."); United States V. Barnett, 398 F.3d 516, 528 (6th Cir. 2005) ("Under the new post-Booker framework, the district court is empowered with greater discretion to consider the factors provided in 18 U.S.C. §3553(a) in determining a proper sentence.")
24. To assist this determination, a court is entitled to find "all the facts appropriate for determining either a guidelines sentence or a non-guideline sentence." Crosby, 397 F.3d at 113.
25. For the reasons set forth more fully below, and in light of the fact that this Court may impose a materially different sentence than a guidelines sentence, the defendant respectfully requests that, the Court impose a sentence of time-served.
26. Nogbou has already spent almost twelve months in jail. This is twice the recommended sentence at an offense level of 7; this is in any case sufficient to meet the goal of 18 U.S.C. §3553(a).

27.       B. THE NATURE AND CIRCUMSTANCES OF THE EVENT SUPPORT  
A SENTENCE OF TIME-SERVED

28.       Factors of 18 U.S.C. §3553(a) instruct the Court to consider the nature and circumstances of the offense and the history and characteristics of the defendant; the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.

29.       The Indictment alleges that:

"On or about August 22, 2007, in the Southern District of New York, Rodolphe Nogbou, the defendant, unlawfully, willfully, and knowingly did forcibly assault, resist, oppose, impede, intimidate, and interfere with a person designated in Title 18, United States Code, section 114, while such person was engaged in and on account of the performance of official duties, and in the commission of said acts, did inflict bodily injury, to wit, Nogbou intentionally struck Court Security Officer Vincent Esposito ("CSO Esposito") in the face...causing CSO Esposito to suffer cuts and abrasions resulting in the need for CSO Esposito to receive medical attention, including stiches.

(Title 18, United States Code, Section 111(a), (b).)"

The complaint states that:

"Nogbou punched the court security officer in the face while the court security officer was using a wand to perform a security check."

30.       The incident is almost completely captured on the court security surveillance video, a copy of which is part of the record in this case.

31.       As discussed in more detail below, a review of the video fails to reveal any evidence to support that the defendant "punched" CSO Esposito.

32.       The lack of any observable "punch" to CSO Esposito's face, tends to contradict the initial basis for Nogbou's arrest.

33. 1. Elements of 18 U.S.C. §111(a)

34. Section 18 U.S.C. §111(a) provides:

35. "Whoever forcibly assaults, resists, opposes, impedes, or interferes with any federal officer while engaged in or on account of the performance of his duties is guilty of the offense."

36. There are four elements to the simple offense:

- (1) the victim must be a federal officer;
- (2) the defendant must forcibly assault, or resist, or oppose or impede, or intimidate, or interfere, with the victim and this forcible action must involve actual physical contact with the victim;
- (3) at the time the victim must be engaged in the performance of official duties;
- (4) and the defendant must act willfully.

37. As discussed below, the defendant submits that, fundamental factual issues exist, concerning whether Vincent Esposito was a federal officer on August 22, 2007 as defined under 18 U.S.C. Section 114; and that a review of the video reveals factual concerns, whether the defendant acted "forcibly" and "willfully".

38. (a) Vincent Esposito is an employee of Akal Security Inc., whose deputation certificate (under previous contract with the United States Marshall's Office) had been expired since 2002. Vincent Esposito the Akal Security Inc., employee did not have any deputation certificate for the contract in effect on August 22, 2007 (date of the incident). However, this fundamental fact had been kept away from the jury.

(b) Forcibly means by use of force. So too is a defendant's present ability to inflict bodily harm coupled with a threat or attempt to inflict present bodily harm. See Sand, Federal Jury Instructions, Instruction 14-4.

Although the government need only prove the defendant did any one of the several alternative acts (assault, resist, oppose, impede, intimidate, or interfere), all the acts are modified by the word "forcibly".

Therefore the government must demonstrate, defendant's use of force.

Moreover, the jury was required to be unanimous as to which of the following alternative acts Nogbou forcibly engaged.

- (c) "Assault" means unlawfully attempt with force and violence to do injury to the person of another.
- (d) "Resist" is to oppose by physical power, striving against, exerting one's self to counteract defeat or frustrate.
- (e) "Oppose" is to resist by physical means.
- (f) "Impede" is to stop progress, obstruct or hinder.
- (g) "Intimidate" is to make timid or fearful, to inspire or affect with fear, to frighten, deter or overawe.
- (h) "Interfere with" is to come into collision with, to intermeddle, to impose, to hinder, to intervene.

See Sand, Federal Jury Instructions, Instruction 14-6, 14-7.

- (i) Willfully means that, the defendant acted voluntarily and intentionally and not by mistake or accident. Sand *supra*, Instruction 14-9.

39.       2. Uncontroverted Facts

40.       As stated above, the existence of a surveillance video allows for an objective review of the incident.

41.       As a preliminary matter, the Court is reminded that, Nogbou had been a regular visitor of the Courthouse since 2005. The defendant had been a Pro Se litigant since 2005. On August 22, 2007, the defendant was entering the Courthouse for the purposes of filing an amended complaint, in a pending matter, Rodolphe Nogbou v. Police Officer LoRe et al., 07 Civ. 8515(RWS), when he had been arrested. The amended complaint was among the items recovered following the defendant's arrest.

42. The defendant would like to bring to the attention of the Court, that he had been denied a copy of the video tape, which is the principal evidence in this case; thus this had greatly impaired the defendant's ability to defend himself properly in this case; since there are and had been fundamental divergences of view between the counsels and defendant, resulting in defendant making motions on his own behalf.
43. The defendant had requested since day one (August 22, 2007) a copy of the video tape, but he had been denied copy of the fundamental discovery material (video tape) by all his respective Court appointed counsels.
44. In his motions to remove former counsel (Mr. Alan Nelson), the defendant had reiterated his request for a copy of the discovery material (video tape), however, his new counsel Mr. Lance Croffoot-Suede, had not provided him (defendant) with a copy of the principal discovery material (the video tape), for the defendant to properly defend himself in this case.
45. Consequently, the defendant will provide, below, the chronology of the incident of August 22, 2007, without the specific time line depicted in the video.
46. For, the time depicted in the video tape will be designated by "At XX", for the purposes of this defendant's sentencing memorandum on his own behalf.
47. A review of the videotape during trial, results in the following chronology of the events of August 22, 2007:
  - (a) "At XX", Nogbou can be seen entering by the revolving door of the Worth Street entrance of the Courthouse.
  - (b) "At XX", Nogbou can be seen quietly standing at the entrance of the security checkpoint area of the lobby, waiting for his turn to go through the security check.
  - (c) As the the security area ahead of Nogbou cleared, he walks straight to the security table, and started emptying his pockets and jacket into the security bin "At XX".
  - (d) "At XX", Nogbou was still outside the metal detector (at the security area's entrance), when CSO Esposito motioned him to come through the metal detector.

- (e) "At XX", while Nogbou is walking through the metal detector, CSO Esposito walks and meets Nogbou half way, with his (CSO Esposito) two arms crossed behind his (CSO Esposito) back,...then puts his face in the face of Nogbou (who had his two arms in the air). -
- (f) "At XX", Nogbou can be seen taking the straps of his coverall off.
- (g) "At XX", CSO Esposito cannot fully be seen in the video; Nogbou has one of his arms in the air, and other holding one side of his pant.
- (h) "At XX", Nogbou can be seen turning away from CSO Esposito, and engages into some conversations with the other court security officers.
- (i) "At XX", Nogbou can be seen returning to CSO Esposito.
- (j) "At XX", Nogbou can be seen holding one side of his pant with one hand, and the other hand raised in the air. However, CSO Esposito cannot fully be seen in the video. CSO Esposito is scanning Nogbou's feet at this point.
- (k) "At XX", Nogbou can be seen, pushed by CSO Esposito into the corner of the security table. At this point, Nogbou can be seen in verbal exchange with the court security officers.
- (l) "At XX", CSO Esposito releases Nogbou.
- (m) "At XX", a CSO can be seen motioning to Nogbou, to leave.
- (n) "At XX", a CSO can be seen given back Nogbou's property to him (Nogbou).
- (o) "At XX", Nogbou can be seen picking up his properties from the security bin.
- (p) "At XX", Nogbou can be seen working something in his hand.
- (q) "At XX", the court security officers put Nogbou under arrest.
- (r) "At XX", Nogbou can be seen in his underwear taking into the lobby, towards the elevators.

48.           3. Disputed Issues
49.           Unfortunately the video is not accompanied by audio, hence the nature an substance of the discussions between Nogbou and the court security officers cannot be heard.
50.           Nogbou relates that, as he entered the Worth Street entrance (into the lobby), he saw two females ahead of him in the security area. So he waited quietly outside the security area for his turn.
51.           As soon as the two females had cleared the security area ahead of Nogbou, he proceeded directly toward the security table, and started emptying his pockets and jacket into the security bin.
52.           Nogbou relates that, even before he can be ready to walk through the metal detector, CSO Esposito had motioned to him (Nogbou) to come through the metal detector.
53.           As Nogbou was walking through the metal detector, CSO Esposito had put his two arms behind him (CSO Esposito), and walked half way and met Nogbou (who already had his two arms in the air), and put his (CSO Esposito) face in the face of Nogbou; and aggressively asked (CSO Esposito) Nogbou to take off his pant.
54.           Nogbou had protested, of why he should take off his pant. Then CSO Esposito made a step backward, and asked Nogbou to take off his pant down, just below his stomach.
55.           Nogbou had complied with that, and unbuckled the straps of his coverall.
56.           Nogbou was holding one side of his pant with one hand, and the other hand was raised in the air.
57.           CSO Esposito started scanning the feet of Nogbou, and without warning, he (CSO Esposito) grabbed one side of Nogbou's pant, opened it, and leaned forward to look inside Nogbou's pant.
58.           Nogbou had put his other hand on the opening and closed it.
59.           Then Nogbou had turned around to complain to the other court security officers, of the behavior of CSO Esposito; but the other court security officers were not giving any positive answers to Nogbou.

60. So Nogbou had returned to CSO Esposito to finish the inspection.
61. CSO Esposito started scanning the feet of Nogbou again, and as soon as he (CSO Esposito) had raised his himself at the level of Nogbou's private part,...and without warning, CSO Esposito had grabbed one side of Nogbou's pant and inserted the wand inside (Nogbou's pant).
62. Nogbou had inserted his other hand into his pant, and swept the wand out of his pant. The wand came out between Nogbou and CSO Esposito, hitting no one.
63. As soon as the wand came out, CSO Esposito started pushing Nogbou; and had pushed Nogbou into the security table's corner.
64. Nogbou, then complained, of why CSO Esposito had to do this to him.  
And that he (Nogbou) will not allow them (CSOs) to obstruct him from coming into the building to do his business.  
And that, he (Nogbou) will take a civil action against them.
65. The court security officers had then told Nogbou to leave; Nogbou walked back to the other side of the metal detector, and the court security oficers had given him (Nogbou) his properties back.
66. Nogbou had collected his belongings out of the security bin, and after saying to CSO Esposito that he (Nogbou) will take his picture, and was (Nogbou) in process of setting his (Nogbou's) camera phone, that the court security officers had put Nogbou under arrest.
67. Nogbou had been taken, for a moment in his underwear, into the Marshall's office, where he had been striped and searched.
68. Nogbou had been put in a cell, and about three hours later, some lawyers had informed Nogbou that, he had punched a court security officer.  
And Nogbou had been incarcerated since that day of August 22, 2007.

69. The video, although not fully displaying the critical event at issue, clearly does not reveal a punch to the face of CSO Esposito.
70. Indeed, Nogbou's arms are clearly visible throughout the event; and there is not a scintilla of evidence to demonstrate any form of assaultive contact by Nogbou upon CSO Esposito.
71. At least initially, upon Nogbou sweeping the wand out of his pant, there was no attempt to arrest him.
72. To the contrary, the video clearly depicts him (Nogbou) being allowed to walk back through the metal detector, and began to pick up his personal belongings out of the security bin, for the purposes of leaving the building.
73. Nogbou contends that, after he swept the wand out of his pant, he was requested by the court security officers to leave the building.
74. Nogbou complained that he had been denied access to the building for lawful and proper purposes; but the complied with the court security officers' request, and was about to leave the building.
75. Nogbou had said to the court security officers, that he will bring a civil action against them, for denying him access to the Court.
76. Nogbou relates, that he attempted to activate his cell phone, to take CSO Esposito's photograph to complain about the denial of his access to the Court. It is at that point Nogbou had been arrested.  
A Cellular telephone was amongst Nogbou's personal effects.

IV. TIME-SERVED IS AN APPROPRIATE SENTENCE  
GIVEN THE FACTS OF THIS CASE

80. The goals of sentencing are met by Nogbou for time-served, at this point. Nogbou has an offense level of 7, and a criminal history category of I, and had spent almost 12 months in jail. This is twice the recommended sentence for an offense level 7.

81. In United States v. Koon, 518 U.S. 81 (1996), the Supreme Court found that the Sentencing Reform Act authorizes district courts to depart in cases which feature aggravating or mitigating circumstances of a kind or to a degree not adequately taken into consideration by the Sentencing Commission.

Justice Kennedy, writing for the Court, advised that, the Sentencing Commission has formulated each guideline to apply to a "heartland of typical cases".

Atypical cases were "not adequately taken into consideration", and factors that may make a case atypical provide a potential basis for departure.

82. Certainly, the facts and circumstances set forth herein demonstrate that, the events of August 22, 2007, were not the type of situation contemplated by the Sentencing Commission when promulgating U.S.S.G. §2A2.4 for offense committed in violation of 18 U.S.C. §111.

In light of Gall and Kimbrough, the discretion set forth in Koon is given even greater weight.

83. Nogbou has already spent almost twelve months in jail. This is twice the recommended sentence at an offense level 7.

#### V. ISSUES CONCERNING THE PRESENTENCE REPORT

84. On July 18, 2008, the defendant's counsel Mr. Lance Croffoot-Suede, had submitted on behalf of the defendant, to the Probation Officer, Mr. Johnny Y. Kim, a version of the defendant's objection to the Presentence Report.

However, as of this 4th day of August 2008, no response had been made to the defense.

85. Consequently, the defendant respectfully attached to the present Defendants' Sentencing Memorandum on his own behalf, and copy of the defendant's objections to the Presentence Report.

VI. ISSUES CONCERNING THE DETAINER SET ON THE  
PRO SE LITIGANT DEFENDANT FOR FURTHER  
INCARCERATION

86. The defendant had been a Pro Se litigant in the Civil Court of the United States District Court, Southern District of New York, and regular visitor of the Courthouse since 2005.
- On august 22, 2007, Nogbou,...a Pro Se litigant,...was coming to serve an amended complaint when he had been arrested, upon an incident initiated and driven by CSO Esposito (an Akal Security Inc., employee, whose deputation certificate was not even valid for the previous contract in 2002, and who did not have any deputation certificate for the new contract in effect on August 22, 2007).
- Moreover, there is not a scintilla of evidence to demonstrate any form of assaultive contact by Nogbou upon CSO Esposito.
87. Nogbou had been charged under 18 U.S.C. 111(a), (b); and had been incarcerated since August 22, 2007, and had faced serious unlawful obstructions and nuisance in litigating his matters in Court. This had resulted in disturbances in the Court proceedings, and the Court interventions had been required for any access of the Pro Se litigant inmate to Court.
88. Further incarceration of Nogbou (Pro Se litigant) will result in further unlawful obstructions and nuisance, and disruptions in Court proceedings. In other words, this will further result in unlawful obstruction of justice.
89. Consequently, the defendant, Pro Se litigant, respectfully requests that, the BICE detainer set upon him be removed, in light of the constitutional clauses; since there are no immigration charges against Nogbou, and this matter (07 CR. 814(JFK))'s proceedings are ongoing.
- It is only upon, the final decision of the Court of Appeals, that immigration proceedings can start. Otherwise, it will simply be an obstruction of Nogbou, from seeking justice; since the basis of his further incarceration by immigration is not yet set.
90. Consequently, Nogbou respectfully requests that, the Detainer be removed by this Court (07 CR. 814(JFK)).

91. VII. CONCLUSION

92. Nogbou is a Pro Se litigant, and was entering the Courthouse on August 22, 2007, for lawful purposes (to serve an amended complaint) when he had been arrested.

For the purposes of sentencing, and based on the nature and circumstances of the events, the history and characteristics of Nogbou,...along with the jury's verdict ("Assault Without Bodily Injury"), and the lack of a specific act of assault committed by the defendant on August 22, 2007,...the defendant respectfully submits that, his proper sentence is 0-6 months, when applying U.S.S.G. §2A2.3

Nogbou had been incarcerated for almost 12 months. This is twice the recommended sentence for an offense level 7.

Thus, the defendant respectfully submits this Sentencing Memorandum on his own behalf.

Dated: New York, New York  
August 04, 2008.

TO HONORABLE JOHN F. KEENAN  
UNITED STATES DISTRICT JUDGE  
SOUTHERN DISTRICT OF NEW YORK  
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*Rodolphe Nogbou*  
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**Linklaters**

**DEFENDANT'S OBJECTIONS TO THE PRESENTENCE  
REPORT:**

**SUBMITTED IN SUPPORT OF DEFENDANT'S  
SENTENCING MEMORANDUM ON HIS OWN  
BEHALF**

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**Defendant**  
Rodolphe Nogbou  
# 60326-054  
MCC-New York  
150 Park Row  
New York, NY  
10007

**By Email and Regular Mail**

July 18, 2008

**Re: U.S. v. Rodolphe Nogbou, 07-CR-814-01 (JFK)**

Dear Mr. Kim:

As you know, Mr. Alan Nelson previously represented Mr. Nogbou in the above-captioned case. Lance Crofoot-Suede was appointed as substitute counsel on May 7, 2008. I am assisting Mr. Crofoot-Suede in his representation of Mr. Nogbou. After reviewing the Presentence Investigation Report ("PSR") prepared on April 16, 2008, Mr. Nogbou would like to correct certain inaccuracies contained therein. This letter details those inaccuracies, in the hope that the items will be amended in your final report.

**Introduction (pages 1-2 of the PSR)**

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### **Remainder of the PSR (by paragraph)**

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(Title 18, United States Code, Section 111(a), (b).)"

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**Paragraphs 12-23 (Offense Level Computation)**

Mr. Nogbou objects to the offense level computation in paragraphs 12-23. Mr. Nogbou was found guilty of violating 18 U.S.C. § 111(a). The jury did not find that he violated 18 U.S.C. § 111(b). The correct base offense to use in determining a sentence is § 2A2.3 ("Minor assault" means a misdemeanor assault, or a felonious assault not covered by § 2A2.2 (Aggravated Assault).) Based on the findings of the jury and uncontested trial evidence, there is no evidence to support using § 2A2.4 as the starting point for a sentence calculation.

The base offense level under § 2A2.3 is 7. While Mr. Nogbou does not admit to any physical contact, because the jury found that the offense involved physical contact the two-level enhancement is applicable. There should be no increase based on § 2A2.3(b)(1) because the jury found that no one suffered a bodily injury. Using this calculation, Mr. Nogbou's Offense Level is 7. With a Criminal History Category of I, his Guideline sentence range is 0-6 months.

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In paragraph 26, Mr. Nogbou would like the PSR be amended to state, "This New York City Criminal Court case (# 2007CN001315) is the subject of a civil action filed in Federal Court, S.D.N.Y., Docket #07-CV-8515(RWS), an action brought by Mr. Nogbou against those who have staged this New York City Criminal Court case."

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The correct information about Mr. Nogbou is in his immigration file, #A093005698. The immigration information in the presentence report is incorrect. No charge has been filed against Mr. Nogbou in immigration court.

In December 2007, the prosecution had given Mr. Nogbou's name to the immigration service. On or about December 21, 2007, an immigration agent had visited Mr. Nogbou at MDC – Brooklyn to know Mr. Nogbou's status in the country. Mr. Nogbou told the agent that Mr. Nogbou's immigration status in the country is in his immigration file. Mr. Nogbou had briefly explained the outstanding legal issues. Mr. Nogbou requested that immigration provide him with counsel for any matter related to knowing his status in the country. No further contact has been made with Mr. Nogbou. There is no charge standing against Mr. Nogbou in immigration court."

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Paragraph 35 states that Mr. Nogbou is 5' 7" tall. Mr. Nogbou is 5' 9" tall.

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**Paragraph 58**

Paragraph 58 should be changed to reflect a total offense level of 7, as explained in our objection to paragraphs 12-23. Based on this offense level and Mr. Nogbou's Criminal History Category of I, the correct range of imprisonment is 0-6 months.

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Paragraph 62 should be changed to reflect that Mr. Nogbou is eligible for probation based on the calculations set forth in our objections to paragraphs 12-23. Mr. Nogbou would be eligible for between one and five years probation under 18 U.S.C. § 3561(c)(1) and U.S.S.G. § 5B1.1(a)(1).

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Paragraph 65 should be changed to reflect that U.S.S.G. § 5E1.2(c)(3) mandates a fine between \$500 and \$5000 for an offense level of 7.

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Mr. Nogbou objects to the description in paragraph 68, and requests the PSR be amended to state, "The decision of a two level enhancement was not made during the presentence interview on March 19, 2008. No decision had been rendered on March 19, 2008. It had not been any argument about what must be applied. The March 19, 2008 presentence interview was only about taking information from the defendant. It was not a session of objection to what applies, since nothing had been done yet. The jury's verdict is 'assault without bodily injury.' This does not mean 'injury was not intended.' 'Without bodily injury' means no injury."

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**Objection to the Addendum to the Presentence Report**

Mr. Nogbou states that he never waived the 35-day disclosure rule, nor did he authorize his attorney to waive the disclosure rule.

**Objections to Sentencing Recommendation**

The Guideline Provisions on page 15 should be changed to reflect the levels found in our objections to Paragraphs 58, 62, and 65 of the PSR.

Mr. Nogbou is not currently aware of any U.S. Immigration and Customs Enforcement (ICE) charging documents pending against him.

Mr. Nogbou also objects to the Justification of Sentencing Recommendation found on pages 15-16.

Best Regards,



Jared R. Jenkins  
Associate

cc: Mr. Rodolphe Nogbou  
Assistant United States Attorney John P. Cronan

The defendant also objects to the PSR as a whole, simply because, this PSR is not a genuine document. The copy of the PSR given to the defendant was not signed or approved by the Probation officers. And this document will not be accepted by any administration as a genuine document.

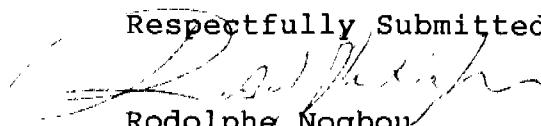
The defendant counsel (Mr. Croffoot-Suede) had given a different copy of the PSR to the defendant,...but the signatures on that copy had been forged. Consequently, the defendant submits that, this objection must also be registered for the record, and for the purposes of the defendant's sentencing memorandum on his own behalf.

Dated: August 04, 2008.

TO HONORABLE JOHN F. KEENAN  
United States District Judge

John P. Cronin  
Assistant U.S. Attorney

Respectfully Submitted,



Rodolphe Nogbou

# 60326-054

Defendant

MCC-New York

150 Park Row, NY, NY

## **EXHIBIT B**

# Linklaters

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Johnny Y. Kim  
U.S. Probation Office  
U.S. District Court  
Southern District of New York  
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